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Uthayakumar a/l Ponnusamy v YAB Dato' Sri Najib bin Tun Razak Perdana Menteri Malaysia & Ors

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-09–72–02 OF 2016
TENGKU MAIMUN, ZAWAWI SALLEH AND AHMADI ASNAWI JJCA
23 SEPTEMBER 2016

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Civil Procedure — Jurisdiction — High Court — Miscellaneous criminal application — Whether reliefs or declaration prayed for within jurisdiction of criminal court — Whether absence of intitulement in application mere irregularity and curable — Whether application ought to be dismissed summarily — Whether application competent — Whether application fulfiled requirements of s 50 of the Courts of Judicature Act 1964

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The appellant filed a miscellaneous criminal application vide a notice of motion ('the application') in the High Court, seeking for several reliefs against respondents. The application was resisted by the prosecution who raised preliminary objections that: (a) the reliefs or the declaration prayed for by the appellant were not within the jurisdiction of the criminal court; and (b) there was no intitulement in the application. In response, the appellant submitted that the application ought not to be dismissed summarily on the preliminary objections without a trial because: (i) the application was made pursuant to the inherent jurisdiction of the court, in particular O 92 r 4 of the Rules of Court 2012 ('the ROC'); (ii) the application was the first of its kind and since the matter involved serious issues of torture, cruel, inhumane and degrading treatment of the prisoners, the appellant should be given his day in court; (iii) the application was correctly filed in the criminal court as it was filed in consequence of his imprisonment for a conviction under sub-s 4(1) of the Sedition Act 1948; (iv) the court had the judicial powers to deal with his application for declaration; and (v) the absence of the intitulement was a minor irregularity which could be cured. In determining the preliminary objections, the learned judicial commissioner ('the JC') relied on art 121(1) of the Federal Constitution which provides for the existence of the High Court in Malaya and Sabah and Sarawak and their jurisdiction and powers; and on s 22 of the Courts of Judicature Act 1964 ('the CJA') in respect of the criminal jurisdiction of the High Court. The JC also adverted to sub-s 25(2) of the CJA which provides for the additional powers of the High Court to issue to any person or authority directions, orders or writs of the nature of habeas corpus, mandamus, prohibition, quo warrants and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them or for any purpose. The JC found that the High Court had no power to grant the reliefs

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sought by the appellant. Accordingly, the preliminary objection was upheld and the application was consequently dismissed. Aggrieved, the appellant filed the present appeal on the grounds that: (1) the appeal was incompetent; and (2) the appeal failed to fulfil the requirements of s 50 of the CJA.

Held, dismissing the appeal; affirming the order of the High Court:

(1) The preliminary objection raised by the prosecution was not of mere technicalities but issues of law which go to the root of the jurisdiction of the court. The application was a classic example of an embarrassing pleading which was liable to be struck out without hearing the merits. The preliminary objection was upheld. It could not be said that the application was filed pursuant to the original criminal jurisdiction of the High Court. It followed that the appeal did not fall under s 50 of the CJA. There was no competent appeal before the court (see paras 7, 13, 20, 25 & 27).

(2) The application was filed as a miscellaneous criminal application and the law governing criminal procedure is the Criminal Procedure Code ('the CPC'). As such, the appellant must conform to the provisions of the CPC in making the application. The reliefs prayed for must fall within the matters allowed under the CPC. However, there is nothing in the CPC to support the application for the reliefs (see para 17).

(3) Due to the absence of any intitulement either in the heading or in the body of the application, it could not be ascertained under which provision of the law was the application made in the High Court. Nonetheless, it was clear that the application was not made in the exercise of the High Court's appellate or revisionary jurisdiction in respect of any criminal appeal decided by the sessions court. This was because although the appellant did allude to his conviction and sentence by the sessions court for an offence under sub-s 4(1)(c) of the Sedition Act 1948, this application had nothing to do with the decision of the sessions court. The appellant had exhausted his avenues in the High Court and in this court in respect of the sedition case and his sentence had been spent (see para 23).

[Bahasa Malaysia summary

Perayu telah memfailkan permohonan jenayah pelbagai melalui notis usul ('permohonan tersebut') di Mahkamah Tinggi, memohon beberapa relif terhadap responden-responden. Permohonan telah ditentang oleh pendakwaan yang menimbulkan bantahan awal bahawa: (a) relif atau deklarasi yang dipohon oleh pemohon bukan dalam bidang kuasa mahkamah jenayah; dan (b) tiada intitulmen dalam permohonan ini. Sebagai jawapan, perayu telah berhujah bahawa permohonan itu tidak patut ditolak terus berdasarkan bantahan awal tanpa perbicaraan kerana: (i) permohonan itu telah dibuat

menurut bidang kuasa sedia ada mahkamah, khususnya A 92 k 4 Kaedah-Kaedah Mahkamah 2012 ('KM'); (ii) permohonan itu yang pertama jenisnya dan oleh kerana perkara itu melibatkan isu-isu serius tentang layanan yang menyiksa, kejam, tidak berperikemanusiaan dan menjatuhkan maruah tahanan, perayu perlu diberikan peluang di mahkamah; (iii) permohonan itu telah difailkan dalam mahkamah jenayah kerana ia telah difailkan berikutan pemenjaraannya kerana sabitan di bawah sub-s 4(1) Akta Hasutan 1948; (iv) mahkamah mempunyai kuasa kehakiman untuk mengendalikan permohonannya untuk deklarasi; dan (v) ketiadaan intitulmen adalah luar aturan kecil yang boleh dipulihkan. Dalam menentukan bantahan awal, pesuruhjaya kehakiman yang bijaksana ('PK') bergantung kepada perkara 121(1) Perlembagaan Persekutuan yang memperuntukkan untuk kewujudan Mahkamah Tinggi Malaya dan Sabah dan Sarawak dan bidang kuasa dan kuasa mereka; dan pada s 22 Akta Mahkamah Kehakiman 1964 ('AMK') berkaitan bidang kuasa jenayah Mahkamah Tinggi. PK juga menggunakan sub-s 25(2) AMK yang memperuntukkan kuasa tambahan Mahkamah Tinggi untuk mengeluarkan kepada mana-mana orang atau pihak berkuasa arahan, perintah atau writ yang bersifat habeas corpus, mandamus, larangan, waran quo dan certiorari, atau mana-mana lain, bagi penguatkuasaan hak-hak yang diberikan oleh Bahagian II Perlembagaan, atau mana-mana daripada mereka atau untuk apa-apa tujuan. PK telah mendapati bahawa Mahkamah Tinggi tidak mempunyai kuasa untuk memberikan relif yang dipohon oleh perayu. Berikutan itu, bantahan awal itu dikekalkan dan permohonan itu akhirnya ditolak. Terkilan, perayu telah memfailkan rayuan ini atas alasan bahawa: (1) rayuan itu tidak kompeten; dan (2) rayuan itu telah gagal memenuhi keperluan s 50 AMK.

Diputuskan, menolak rayuan; mengesahkan perintah Mahkamah Tinggi:

(1) Bantahan awal yang ditimbulkan oleh pendakwaan bukan hanya teknikal tetapi isu-isu perundangan sehingga kepada punca bidang kuasa mahkamah. Permohonan itu adalah contoh klasik tentang pliding yang boleh dibatalkan tanpa mendengar merit. Bantahan awal itu dikekalkan. Ia tidak boleh dikatakan bahawa permohonan itu telah difailkan menurut bidang kuasa jenayah asal Mahkamah Tinggi. Ia diikuti bahawa rayuan itu tidak terjatuh di bawah s 50 AMK. Tiada rayuan kompeten di hadapan mahkamah (lihat perenggan 7, 13, 20, 25 & 27).

(2) Permohonan itu telah difailkan sebagai permohonan jenayah pelbagai dan undang-undang yang mengawal prosedur jenayah adalah Kanun Tatacara Jenayah ('KTJ'). Oleh itu, perayu perlu mematuhi peruntukan-peruntukan KTJ dalam membuat permohonan itu. Relif-relif yang dipohon perlu terangkum dalam perkara-perkara yang dibenarkan di bawah KTJ. Walau bagaimanapun, tiada apa dalam KTJ untuk menyokong permohonan itu untuk relif-relif tersebut (lihat perenggan 17).

(3) Akibat ketiadaan apa-apa intitulement dama ada pada tajuk atau dalam isi permohonan itu, ia tidak boleh dipastikan di bawah peruntukan undang-undang mana permohonan itu dibuat di Mahkamah Tinggi. Walau apa pun, adalah jelas bahawa permohonan itu tidak dibuat dalam melaksanakan bidang kuasa rayuan atau semakan Mahkamah Tinggi berkaitan apa-apa rayuan jenayah yang diputuskan oleh mahkamah sesyen. Ini adalah kerana meskipun perayu mengku kepada sabitan dan hukumannya oleh mahkamah sesyen kerana kesalahan di bawah sub-s 4(1)(c) Akta Hasutan 1948, permohonan ini tiada kaitan dengan keputusan mahkamah sesyen. Perayu teah menggunakan semua peluangnya di Mahkamah Tinggi dan di mahkamah ini berkaitan kes hasutan dan hukumannya telah tamat (lihat perenggan 23).]

Notes

For cases on High Court, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 5776–5862.

Cases referred to

Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457, CA (folld)
Ketua Pengarah Imigresen Malaysia lwn Heng Peo [2007] 3 MLJ 97, CA (folld)
Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC (refd)
PP v Kok Wah Kuan [2008] 1 MLJ 1, FC (refd)
Teh Cheng Poh v PP [1979] 1 MLJ 50, PC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 22, 22(1)(a), (1)(b), 25(2), 26, 30, 31, 35, 50, 67
Criminal Procedure Code s 376(1)
Evidence Act 1950
Federal Constitution arts 5(3), 8, 121(1), (1B), 145(3), Part II
Government Proceedings Act 1956 s 21, 21(1)
Legal Profession Act 1976
Penal Code
Prison Act 1995
Prisons Regulations 2000
Rules of Court 2012 O 1 r 2(2), O 92 r 4
Sedition Act 1948 s 4(1), (1)(c)
Specific Relief Act 1950

Appeal from: Criminal Application No 44–97–10 of 2015 (High Court, Kuala Lumpur)

The appellant appeared in person.
Awang Armadajaya bin Awang Mahmud (Nadia Hanim bt Mohd Tajuddin and

Norinna bt Bahadun with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondents.

Tengku Maimun JCA (delivering judgment of the court):

BACKGROUND

[1] The appellant filed a miscellaneous criminal application vide a notice of motion ('the application') in the High Court at Kuala Lumpur, seeking for several reliefs against the Prime Minister, the Minister of Home Affairs, the Director General of the Prisons Department Malaysia, the Director of the Kajang Prison, the attorney general and the Government of Malaysia. They were cited as the first respondent to the sixth respondent, respectively.

[2] The application, as can be seen at pp 41–48 of the appeal record, was very lengthy. For brevity, we will adopt with modifications the application as summarised by learned DPP in his written submission as follows:

(a) that the first respondent on the advice of the fifth respondent to propose to the Yang Di-Pertuan Agong for the setting up of a Royal Commission of Inquiry to be led by the appellant or a human rights lawyer to investigate into the appellant's complaints as written in his book entitled 'Torture in Malaysia Prisons';

(b) that all prisoners in the prisons in Malaysia be given equal health care and treatment by specialist just like any other citizen;

(c) a declaration that the appellant is a political prisoner and the imprisonment of the appellant with other ordinary prisoners without being separated like the Malay and Chinese political prisoners and the instruction that the appellant remove his slippers and sit on the floor while talking to the prison officers who sit on chairs with tables is racist and contrary to art 8 of the Federal Constitution;

(d) various declarations that some of the prison conditions are in breach of the Prison Act 1995, the Prisons Regulations 2000 and the Standard Minimum Rules for the Treatment of Prisoners adopted by the First United Nations Congress held at Geneva in 1955;

(e) various declarations that some general practices in the prison are in breach of art 5(3) of the Federal Constitution, the Evidence Act 1950, the Legal Profession Act 1976, the Penal Code, the Prison Act 1995, the Prisons Regulations 2000 and the Standard Minimum Rules for the Treatment of Prisoners adopted by the First United Nations Congress held at Geneva in 1955;

(f) that the first and/or the second respondents appoint the appellant or any human rights lawyer as the 'Ketua Pengarah Hak Asasi Minima

Banduan (UN) Malaysia' having the same status, salary and power as the 'Ketua Pengarah Jabatan Penjara Malaysia' having office at Ibu Pejabat Jabatan Penjara Malaysia and having the power to receive, investigate and propose appropriate actions to the first and second respondents and/or to lodge police reports as an independent check and balance;

(g) that two human rights lawyers be appointed as the 'Pengarah Hak Asasi Minima Banduan (UN) Malaysia' and the 'Timbalan Pengarah Hak Asasi Minima Banduan (UN) Malaysia' by the first and/or the second respondents having the same status, salary and powers of the 'Pengarah' and 'Timbalan Pengarah Penjara' and it is compulsory for them to visit and receive complaint in at least one prison block every day and having office at the prisoners waiting area to also be able to receive complaint from family members of the prisoners, lawyers and public especially on weekends and public holidays;

(h) that 'transvestite' prisoner is put in a separate cell to avoid being abused;

(i) that Muslim prisoners are allowed to perform Friday prayers and to perform prayers facing the 'kiblat';

(j) that the fifth respondent prosecutes all individuals that committed criminal act towards the appellant and other prisoners;

(k) that the respondents abolish the death penalty, life imprisonment, whipping and imprisonment more than 20 years; and

(l) that the parole program be led by a human rights lawyer.

PROCEEDINGS IN THE HIGH COURT

[3] The application was resisted by learned DPP who raised the following preliminary objections:

(a) the reliefs or the declaration prayed for by the appellant were not within the jurisdiction of the criminal court; and

(b) there was no intitulement in the application.

[4] In response, the appellant submitted that the application ought not to be dismissed summarily on the preliminary objections without a trial for the following reasons:

(a) the application was made pursuant to the inherent jurisdiction of the court, in particular O 92 r 4 of the Rules of Court 2012 ('the ROC');

(b) the application was the first of its kind and since the matter involved serious issues of torture, cruel, inhumane and degrading treatment of the prisoners, the appellant should be given his day in court;

(c) the application was correctly filed in the criminal court as it was filed in consequence of his imprisonment for a conviction under sub-s 4(1) of the Sedition Act 1948;

(d) the court had the judicial powers to deal with his application for declaration; and

(e) the absence of the intitulement was a minor irregularity which could be cured.

[5] In determining the preliminary objections, the learned judicial commissioner relied on art 121(1) of the Federal Constitution which provides for the existence of the High Court in Malaya and the High Court in Sabah and Sarawak and their jurisdiction and powers and on s 22 of the Courts of Judicature Act 1964 ('the CJA') in respect of the criminal jurisdiction of the High Court.

[6] The learned Judicial Commissioner also adverted to sub-s 25(2) of the CJA which provides for the additional powers of the High Court to issue to any person or authority directions, orders or writs of the nature of habeas corpus, mandamus, prohibition, quo warrants and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them or for any purpose.

[7] Having regard to the statutory provisions and the cases of *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1; *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 and *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, the learned judicial commissioner found that the High Court had no power to grant the reliefs sought by the appellant. Accordingly, the preliminary objection was upheld and the application was consequently dismissed. Aggrieved, the appellant appealed to this court.

THE APPEAL

[8] When the appeal came up before us, learned DPP again raised a preliminary objection, this time on the grounds that:

(a) the appeal was incompetent; and

(b) the appeal failed to fulfil the requirements of s 50 of the CJA.

[9] Learned DPP submitted that the High Court was not seized with the jurisdiction to hear the application filed by the appellant because as conferred by the CJA, the jurisdiction and powers of the High Court are the original jurisdiction; appellate jurisdiction; supervisory jurisdiction; revisionary jurisdiction and inherent jurisdiction (see ss 22, 26, 30, 31 and 35 of the CJA).

The application filed by the appellant did not fall under any of the above jurisdiction. And if the High Court was not seized with jurisdiction, this court similarly was not seized with jurisdiction to hear the appeal. Put another way, since the High Court had no jurisdiction, the matter was a non-starter and the appeal cannot stand.

[10] Learned DPP had also highlighted the parties named as respondents in the appeal, who were other than the public prosecutor. They were:

(a) YAB Dato Sri Najib bin Tun Abdul Razak, Perdana Menteri Malaysia;

(b) YAB Dato Seri Ahmad Zahid bin Hamidi, Menteri Dalam Negeri;

(c) Dato Sri Zulkifli bin Omar, Ketua Pengarah Jabatan Penjara Malaysia;

(d) Abdul Wahab bin Abdul Kassim, Pengarah Penjara Kajang;

(e) Peguam Negara Malaysia; and

(f) Kerajaan Malaysia.

[11] By citing the Government of Malaysia as one of the respondents, learned DPP submitted that the application fell within the realm of a civil matter under s 21 of the Government Proceedings Act 1956 (Revised 1988) ('the GPA') and being a civil matter, the appeal cannot be governed by s 50 but by s 67 of the CJA. Under s 67, the appellant had to file in the record of appeal and the memorandum of appeal which obviously was not done in this instance.

[12] The appellant repeated his stance in the High Court that the application cannot be thrown out based on technicalities and that the High Court had the inherent powers to deal with the application. The appellant submitted that the application was premised on his criminal conviction, thus it originated from a criminal case. The appellant further submitted that the application was made for and on behalf of more than 4000 other prisoners and the application if dismissed would give a licence to the prison authorities to do as they like.

OUR DECISION

[13] Having considered the submissions and the authorities, we found that the preliminary objection raised by the prosecution was not of mere technicalities but issues of law which go to the root of the jurisdiction of the court. In the circumstances, we upheld the preliminary objection and we dismissed the appeal. We now give our reasons.

A INTITULEMENT

[14] The appellant had submitted that the issue of intitulement was a minor irregularity which could be cured. We disagreed with the appellant. In *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457, Gopal Sri Ram JCA (as he then was) said at p 477:

> The plaintiff, as noted earlier, says that if one were to undertake a careful scrutiny of the originating summons and the affidavit in support, one would come to the conclusion that it is not an application made under O 89. The summons does not, as I observed very early in this judgment, state any particular rule of court in its intitulement. Now, I think that that is not only wrong but plainly embarrassing. How, might one ask, is a defendant or the court to determine which rule of court the plaintiff is invoking unless he explicitly specifies it? If a defendant and the court should have to conduct a close examination of the supporting affidavit in each case in order to determine the particular jurisdiction or power that is being invoked by an originating summons or other originating process that requires an intitulement, then a plaintiff will be at liberty to shift from one rule to another or indeed from one statute to another as it pleases him without any warning whatsoever to his opponent or the court. It would make a mockery of the principle that there must be no surprise in civil litigation ...
>
> In my judgment, this matter, which is a point of practice and procedure, is to be resolved by reference to the fundamental principle that a party must not take his opponent or the court by surprise. It is my opinion that an originating process requiring an intitulement must state, with sufficient particularity, either in its heading or in its body, the statute or rule of court under which the court is being moved; otherwise it would be an embarrassing pleading and be may be *(sic)* liable to be struck out, unless sooner amended.

[15] A similar issue was canvassed in *Ketua Pengarah Imigresen Malaysia lwn Heng Peo* [2007] 3 MLJ 97 wherein Zulkefli Makinudin JCA (now CJM) said at p 105:

> [14] Sungguhpun salah satu daripada tajuk-tajuk perkara kepada permohonan tersebut ada menyatakan Kanun Acara Jenayah ('KAJ'), persoalannya adalah di bawah peruntukan mana KAJ ianya dibuat. Sesuatu permohonan jenayah yang boleh dibuat adalah terhad kepada apa yang dibenarkan dipohon di bawah KAJ tersebut dan atas bidang perkara tertentu sahaja antara lainnya seperti berikut:
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> (i) permohonan untuk suatu bon kehadiran orang kena tuduh di mahkamah di bawah s 49;
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> (ii) permohonan untuk suatu bon kehadiran pengadu dan saksi- saksi di bawah s 118;
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> (iii) permohonan untuk mengemukakan harta benda atau dokumen di mahkamah di bawah s 51;
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> (iv) prosedur permohonan oleh pihak polis berkenaan rampasan harta benda di bawah s 413;

(v) permohonan untuk tahanan di bawah s 117; A

(vi) permohonan untuk suatu penggantungan penghakiman sementara menanti rayuan di bawah s 311; dan

(vii) permohonan untuk suatu writ habeas corpus di bawah ss 365 dan 366.

[15] Di dalam kes ini apa yang dapat dilihat daripada perintah atau relif yang dipohon oleh permohon adalah ianya tidak tergolong langsung dalam bidang perkara yang dibenarkan di bawah KAJ, tetapi ianya pada pandangan kami, sepatutnya dibuat dan dipohon di bawah undang-undang yang lain. Relif yang dipohon oleh pemohon adalah berbentuk satu perintah mandamus dan dalam hal perkara ini pemohon sepatutnya memulakan prosiding permohonan semakan kehakiman untuk relif tersebut melalui tatacara yang ditetapkan di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Mengikut peruntukan A 53 k 3 KMT pemohon hendaklah memperoleh kebenaran Mahkamah terlebih dahulu untuk suatu permohonan semakan kehakiman difailkan dan kehendak ini juga tidak dipatuhi oleh pemohon. Sekiranya tiada kebenaran terlebih dahulu diperoleh oleh pemohon dalam kes sekarang ini maka Mahkamah dianggap telah bertindak tanpa bidang kuasa dalam membenarkan pemohon untuk suatu perintah mandamus (sila lihat kes *Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor* [1983] 2 MLJ 541). B C D

[16] Perintah mandamus juga boleh dipohon oleh pemohon terhadap pengkhidmat awam untuk melaksanakan sesuatu tindakan melalui kaedah permohonan yang diperuntukkan di bawah ss 44 dan 45 Akta Relif Spesifik 1950 ('Akta 137'). Tiada kebenaran ('leave') diperoleh terlebih dahulu sebelum permohonan untuk relif atau remedinya dipohon melalui kaedah yang diperuntukkan di bawah ss 44 dan 45 Akta 137 (sila lihat kes *Metro Pacific Sdn Bhd v Ketua Pengarah Kesatuan Sekerja & Anor* [2001] 4 MLJ 616. Di dalam kes sekarang ini pemohon tidak berbuat demikian dan tidak ada menyatakan peruntukan berkenaan sebagai tajuk perkara kepada permohonan yang difailkan. E F

[17] Kami berpendapat oleh kerana terdapat dua kaedah berlainan yang boleh digunakan oleh pemohon untuk memperolehi perintah mandamus terhadap pengkhidmat awam untuk melaksanakan sesuatu tindakan iaitu melalui peruntukan A 53 KMT dan melalui peruntukan ss 44 dan 45 Akta 137 maka pemohon hendaklah menyatakan dengan tepat dan jelas atas undang-undang yang mana permohon bergantung dalam permohonan pemohon tersebut. Kegagalan pemohon berbuat demikian telah mengakibatkan YA Hakim Mahkamah Tinggi yang membicarakan kes ini bertindak tanpa bidang kuasa dan perintah yang diberi adalah salah di sisi undang-undang. G H

[16] The principle in *Cheow Chew Khoon* and *Heng Peo* applies squarely to the present appeal. We noted that while there was a reference to the Criminal Procedure Code ('the CPC') in the application in *Heng Peo*, here the application was absolutely silent either in the heading of the application or in its body as to the statute or the rule of court under which the application was made. I

[17] Further, it must be kept in mind that the application was filed as a miscellaneous criminal application and that the law governing criminal procedure is the CPC. As such, the appellant must conform to the provisions of the CPC in making the application, that is to say, the reliefs prayed for must fall within the matters allowed under the CPC. However, we found nothing in the CPC to support the application for the above reliefs.

[18] At this juncture, it is pertinent to highlight that the appellant was seeking for the reliefs of mandamus and declaration which reliefs are provided for under the Specific Relief Act 1950 ('the SRA'). The SRA pertains essentially to reliefs and remedies for civil action. And insofar as civil action is concerned, the definition in s 3 of the CJA reads:

> a civil proceeding commenced by writ or in such other manner as is prescribed by rules of court, but does not include a criminal proceeding;

while sub-s 21(1) of the GPA provides that:

> Civil proceedings by or against the Federal Government shall be instituted by or against, as the case may be, the Government of Malaysia.

[19] Apart from the above, pursuant to art 145(3) of the Federal Constitution and sub-s 376(1) of the CPC, the attorney general shall be the public prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under the CPC. Hence, in criminal proceedings, the correct party to be cited would be the public prosecutor. The application, however, did not cite the public prosecutor as the respondent. Instead, the appellant cited the Government of Malaysia whereas as stipulated in sub-s 21(1) of the GPA, the Government of Malaysia is only named as a party in civil proceedings.

[20] In the light of all the above, we were of the considered view that the application was a classic example of an embarrassing pleading which was liable to be struck out without hearing the merits.

POWERS AND JURISDICTION OF THIS COURT

[21] The powers and jurisdiction of this court is provided for in art 121(1B) of the Federal Constitution which reads:

> 121 Judicial power of the Federation
>
> (1) ...
>
> (1B) There shall be a court which shall be known as the Mahkamah Rayuan (Court of Appeal) and shall have its principal registry at such place as the Yang di-Pertuan Agong may determine, and the Court of Appeal shall have the following jurisdiction, that is to say —

(a) jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decisions of High Court given by a registrar or other officer of the Court and appealable under federal law to a judge of the Court); and

(b) such other jurisdiction as may be conferred by or under federal law.

[22] In dealing with the instant appeal this court is also governed by s 50 of the CJA which states:

50(1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court —

(a) in the exercise of its original jurisdiction; and

(b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal appeal decided by the Sessions Court.

[23] Due to the absence of any intitulement either in the heading or in the body of the application, it cannot be ascertained under which provision of the law was the application made in the High Court. Nonetheless, it was clear that the application was not made in the exercise of the High Court's appellate or revisionary jurisdiction in respect of any criminal appeal decided by the sessions court. This was because although the appellant did allude to his conviction and sentence by the sessions court for an offence under sub-s 4(1)(c) of the Sedition Act 1948, this application had nothing to do with the decision of the sessions court. The appellant had exhausted his avenues in the High Court and in this court in respect of the sedition case and his sentence had been spent.

[24] What is left would be the original criminal jurisdiction of the High Court as provided in s 22 of the CJA:

22(1) The High Court shall have jurisdiction to try —

(a) all offences committed —

(i) within its local jurisdiction;

(ii) on the high seas on board any ship or on any aircraft registered in Malaysia;

(iii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft;

(iv) by any person on the high seas where the offence is piracy by the law of nations;

(b) offences under Chapters VI and VIA of the Penal Code [Act 574] and under any of the written laws specified in the Schedule to the Extra-Territorial Offences Act

A 1976 [Act 163], or offences under any other written law the commission of which is certified by the Attorney General to affect the security of Malaysia committed as the case may be —

(i) on the high seas on board any ship or on any aircraft registered in Malaysia;

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(ii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft;

(iii) by any citizen or any permanent resident in any place without and beyond the limits of Malaysia;

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(iv) by any person against a citizen of Malaysia;

(v) by any person against property belonging to the Government of Malaysia or the Government of any State in Malaysia located outside Malaysia, including diplomatic or consular premises of Malaysia;

D

(vi) by any person to compel the Government of Malaysia or the Government of any State of Malaysia to do or refrain from doing any act;

(vii) by any stateless person who has his habitual residence in Malaysia;

(viii) by any person against or on board a fixed platform while it is located on the continental shelf of Malaysia; or

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(ix) by any person who after the commission of the offence is present in Malaysia.

(2) The High Court may pass any sentence allowed by law.

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[25] The application certainly did not relate to any of the offences stipulated in paras (a) and (b) of s 22. Hence, it cannot be said that it was filed pursuant to the original criminal jurisdiction of the High Court. It follows that the appeal did not fall under s 50 of the CJA.

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[26] Finally, the appellant had relied on O 92 r 4 of the ROC to argue that the High Court had the inherent jurisdiction to determine the application. We found the appellant's reliance on the ROC misconceived in view of O 1 r 2(2) of the ROC which states:

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These Rules do not have effect in relation to proceedings in respect of which rules have been made or may be made under any written law for the specific purpose of such proceedings or in relation to any criminal proceedings.

CONCLUSION

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[27] Based on all the above, we agreed with learned DPP that there was no competent appeal before us. In the circumstances, we upheld the preliminary objection. The appeal was dismissed and the order of the High Court was affirmed.

Appeal dismissed; the order of High Court affirmed.

Reported by Afiq Mohamed